No. 94-859

Supreme Court, U.S.
FILED
MAR 2 2 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, SECRETARY
OF THE INTERIOR, ET AL.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES
FOR A GREAT OREGON, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF AMICUS CURIAE STATE OF ARIZONA EX REL. M.J. HASSELL, ARIZONA STATE LAND COMMISSIONER AND STATE OF COLORADO IN SUPPORT OF RESPONDENTS

GRANT WOODS
Attorney General
State of Arizona

MARY MANGOTICH GRIER*
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007
(602) 542-7783

GALE A. NORTON
Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, CO 80203
(303) 866-3052

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

40 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

The Lower Court Correctly Concluded That The "Harm" Regulation Is Invalid On Its Face As An Appropriation Of Authority By FWS That Was Neither Expressly Conferred, Nor Intended, By Congress 5

A. Congress Intended to Impose the Burdens of the Act's Mandated Conservation Measures Upon the Federal Government 5

B. Affirming Invalidation of the "Harm" Regulation Would Avoid Substantial Constitutional Questions 11

1. Section 9, As Construed By The "Harm" Regulation, Will Result In Claims For Compensation For The Taking of Nonfederal Property 12

2. Section 9, As Construed By the "Harm" Regulation, May Be Unconstitutionally Vague 15

3. The Harm Regulation Is Constitutionally Suspect As An Overbroad Construction Of A Criminal Statute 18

4. Constitutional Authority for the Harm Regulation Is In Doubt 20

TABLE OF CONTENTS – Continued

Page

C. The Act Should Not Be Construed in a Way That Intrudes Upon Traditional State Authority Over Nonfederal Lands and Upsets the Balance of Federal and State Powers..... 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295 (1976) 10, 13

Andrus v. Utah, 446 U.S. 500 (1980) 12

Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) 15

Block v. North Dakota, 461 U.S. 273 (1983) 14

Cheek v. United States, 498 U.S. 192 (1991) 11

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 18

Colautti v. Franklin, 439 U.S. 379 (1979) 17

Crandon v. United States, 494 U.S. 152 (1990) 18

Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) 15

Edward J. De-Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 5, 11

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 25

Geer v. Connecticut, 161 U.S. 519 (1896), *overruled on other grounds, Hughes v. Oklahoma*, 441 U.S. 322 (1979) 26

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 24

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993) 24

Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264 (1981) 20

Katzenbach v. McClung, 379 U.S. 294 (1964) 26

TABLE OF AUTHORITIES – Continued

Page

Kleppe v. New Mexico, 426 U.S. 529 (1976) 20

Lassen v. Arizona ex rel. Arizona Highway Dept., 385 U.S. 458 (1967) 13, 14

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) 14

Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986) 7

NBH Land Co. v. United States, 576 F.2d 317 (Ct. Cl. 1978) 15

New York v. United States, 112 S. Ct. 2408 (1992) 5, 25, 28

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 14

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941) 13

Palila v. Hawaii Dept. Of Land and Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) 7, 17

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 15

Sierra Club v. Babbitt, 995 F.2d 571 (5th Cir. 1993) 9

Sierra Club v. Hodel, 675 F. Supp. 594 (Utah 1987), *aff'd in part and rev'd in part*, 848 F.2d 1068 (1988) 14

Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in pertinent part sub. nom., Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) 17

State of Utah v. Andrus, 486 F. Supp. 995 (Utah 1979) 14

TABLE OF AUTHORITIES – Continued

Page

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 9, 10

Touby v. United States, 500 U.S. 160 (1991) 19

United States v. 78.61 Acres of Land in Dawes and Sioux Counties, 265 F. Supp. 564 (Neb. 1967) 14

United States v. 111.2 Acres of Land in Ferry County, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (1970) 14

United States v. Bayview Homes, Inc., 474 U.S. 121 (1985) 15

United States v. Fox, 94 U.S. 315 (1876) 26

United States v. Mazurie, 419 U.S. 544 (1975) 18

United States v. New Mexico, 438 U.S. 696 (1978) 27

United States v. Nguyen, 916 F.2d 1016 (5th Cir. 1990) 15

United States v. Rollins, 706 F. Supp. 742 (D. Idaho 1989) 16

United States v. State of California, 281 F.2d 726 (9th Cir. 1960) 26

United States v. State of Montana, 134 F.2d 194 (9th Cir. 1943) 13

United States v. Thompson/Center Arms Co., 112 S. Ct. 2102 (1992) 18

United States v. X-Citement Video, 115 S. Ct. 464 (1994) 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

TABLE OF CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, §§ 8 and 9 15

TABLE OF STATUTORY PROVISIONS

Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

16 U.S.C. § 1531 10

16 U.S.C. § 1533(b)(2) 10

16 U.S.C. § 1533(d) 26

16 U.S.C. § 1535(c)(1)(E)(ii) 26

16 U.S.C. § 1535(g)(2)(B) 26

16 U.S.C. § 1536 10

16 U.S.C. § 1540(b) 1

18 U.S.C. § 3559 1

18 U.S.C. § 3571 1

Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3752 10

Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701, § 1712(c)(9) 26

Federal Urban Land Utilization Act, 40 U.S.C. § 533 26

TABLE OF AUTHORITIES – Continued

Page

Migratory Bird Treaty Act 16 U.S.C. §§ 703 and 707 16

Uniform Conservation Easement Act, 12 U.L.A. 66 (Supp. 1992) 8

FEDERAL REGULATIONS AND NOTICES

50 CFR § 17.3 1

Determination of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820-5827 (Feb. 8, 1994) 6

Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 (Jan. 15, 1992) ... 6, 20

Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26194 (June 26, 1991) 7

Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher, 60 Fed. Reg. 10694 (Feb. 27, 1995) 7

Proposed Determination of Critical Habitat for the Mexican Spotted Owl, 59 Fed. Reg. 63162 (proposed Dec. 7, 1994) 2, 7

Proposed Rule to List the Cactus Ferruginous Pygmy-Owl As Endangered With Critical Habitat in Arizona and Threatened in Texas, 59 Fed. Reg. 63975 (proposed Dec. 12, 1994) 2, 7

Proposed Rule to List the Southwestern Willow Flycatcher As Endangered With Critical Habitat, 58 Fed. Reg. 39495 (proposed July 23, 1993) 2

Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, 58 Fed. Reg. 65088 (Dec. 10, 1993) 6

TABLE OF AUTHORITIES – Continued

Page

United States Fish and Wildlife Service, Region 1, *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* (July 4, 1990) 8

LEGISLATIVE MATERIALS

Endangered Species: Hearings on H.R. 376 and Other Bills Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. On Merchant Marine and Fisheries, 93d Cong., 1st Sess. 251, 287, 299, 301, 307 (1973) 22

Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. On Environment and Public Works, 97th Cong., 2d Sess. 10 (1982) 24

Endangered Species Authorization: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries, 95th Cong., 2d Sess. 1155 (1978) 19

Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. On Environment of the Senate Comm. On Commerce, 93d Cong., 1st Sess. 27 (1973) 21, 22

S. Rep. No. 93-307, 93d Cong., 1st Sess., *reprinted in* 1973 U.S.C.C.A.N. 2989 22

119 Cong. Rec. 30,162 (daily ed. Sep. 18, 1973) 23

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

G. Coggins and W. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?* 61 Iowa L.J. 1099 (1976) 20

Comment, *Endangered Species Act: Constitutional Tensions and Regulatory Discord,* 4 Colum. J. Envtl. L. 97 (1977) 20

W.W. Covington and M.M. Moore, *Postsettlement Changes in Natural Fire Regimes and Forest Structure: Ecological Restoration of Old-Growth Ponderosa Pine Forest, in Assessing Forest Ecosystem Health in the Inland West,* (R. Neil Sampson and David L. Adams, eds., 1994) 8

Albert Gidari, *The Endangered Species Act: Impact of Sections 9 on Private Landowners,* 24 Envtl. L. 419 (1994) 8, 9

Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements,* 63 Tex. L. Rev. 433 (1984) 8

Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,* 71 Iowa L. Rev. 631 (1986) 27

Note, *Increased Scrutiny for the Administrative Crime,* 77 Cornell L. Rev. 612 (1992) 19

James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act,* 14 Harv. Envtl. L. Rev. 311 (1990) 6, 25

TABLE OF AUTHORITIES - Continued

Page

Robert D. Thornton, *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973,* 21 Envtl. L. 605 (1991) 9

United States Forest Service, *Fire and Forest Health Southwestern Region* (1992) 8

Kimberly K. Winter, *The Endangered Species Act Under Attack: Could Conservation Easements Help Save the ESA?* 13 No. Ill. U. L. Rev. 371 (1993) 8

INTEREST OF AMICUS CURIAE

The State of Arizona, *ex rel.* M. J. Hassell, Commissioner of the Arizona State Land Department ("State Land"), administers approximately nine and a half million acres of land, or roughly thirteen percent of all lands within the State of Arizona. The United States Congress granted these lands in trust to the State of Arizona for the benefit of public schools and other institutions, as part of the intergovernmental contracts by which Arizona was made a Territory and then admitted to the Union. Similar grants were made to Colorado, which now owns approximately three million acres, and to most other states admitted after formation of the Union.

Reinstatement of the sweeping definition of "harm" in 50 CFR § 17.3 (the "harm" regulation) struck by the lower court would place State Land in the untenable position of choosing between its mission to use trust lands to provide revenues for the benefit of Arizona schools and public institutions, and possible criminal prosecution if it uses school trust lands in a manner considered by United States Fish and Wildlife Service ("FWS") to be harmful to listed species.[1]

The dilemma is significant, given the scope of recent FWS attempts to secure additional wildlife habitat. For example, recent FWS regulations propose to designate 4.7

---

[1] Persons guilty of a prohibited act of "harm" may be imprisoned for up to one year and fined up to $100,000 for each member of the species taken. 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559, 3571.

million acres of land in Arizona and New Mexico, including 3,333 acres of Arizona's school trust land, as critical habitat for the Mexican spotted owl;[2] about 300 miles of rivers and streams in Arizona, including several thousand acres of school trust land, as critical habitat for three cactus ferruginous pygmy owls;[3] and 280 miles of riparian habitat in Arizona, including several hundred acres of school trust land, for the southwestern willow flycatcher.[4] Through the "harm" regulation, the designation of these lands as critical habitat subjects them to various management restrictions, such as prohibitions on grazing, certain water uses, the thinning of timber, and even something as basic as preventing fires. The "harm" regulation thus interferes with State Land's fiduciary duty by imposing management restrictions that constrain the use, management and disposition of school trust lands.

State Land supports the objectives of programs which preserve essential wildlife habitats and promote the health and biodiversity of ecosystems. However, the worthiness of FWS's goal cannot justify its unauthorized use of the "harm" regulation to criminalize ordinary land use in order to coerce states and other entities to make

---

[2] *Proposed Determination of Critical Habitat for the Mexican Spotted Owl*, 59 Fed. Reg. 63162, 63167 (Table 1) and 63171 et seq. (proposed Dec. 7, 1994).

[3] *Proposed Rule to List the Cactus Ferruginous Pygmy-Owl As Endangered With Critical Habitat in Arizona and Threatened in Texas*, 59 Fed. Reg. 63975, 63982 and 63985-86 (proposed Dec. 12, 1994).

[4] *Proposed Rule to List the Southwestern Willow Flycatcher As Endangered With Critical Habitat*, 58 Fed. Reg. 39495, 39509-39527 (proposed July 23, 1993).

nonfederal lands available as wildlife habitat without compensating landowners for the use of those lands.[5]

SUMMARY OF ARGUMENT

The legislative history, structure of the Act, and general principles of statutory construction all indicate that Congress did not intend Section 9 of the Endangered Species Act (hereinafter "the Act") to encompass habitat modifications as defined by Petitioner's "harm" regulation. In that regard, State Land concurs with, but will not reiterate, the lower court's analysis and the arguments presented by Respondents and Amicus Curiae State of California, *et al.* and the lower court. As additional support for the lower court's decision, State Land identifies issues that are of particular concern to State Land and other nonfederal governmental entities.

First, the "harm" regulation extends the reach of the Act in a manner that shifts the economic burdens of federal objectives to nonfederal property owners. This attempted extension by FWS departs from Congress' statutory scheme, which burdens only federal agencies and offers states cooperation and incentives rather than coercion.

Second, the "harm" regulation raises constitutional issues that otherwise could be avoided. Congress itself questioned the authority of the federal government to

[5] The parties have consented to the filing of this brief by State Land. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

regulate nonfederal land and flora. The taking of an interest in state trust lands (a conservation easement for the benefit of wildlife) without compensation is contrary to state and federal law, and may create a Fifth Amendment right to compensation for the interest taken. This Court should avoid interpreting the Act in a manner that creates unfunded monetary liabilities for the federal government. Moreover, because it imposes strict criminal liability for ordinary land uses, such as removal of vegetation from private lands, under variable, ill-defined conditions that are not self-evident, the "harm" regulation may be unconstitutionally vague as applied. Instead of affording deference to the regulation, this Court should construe the criminal provisions of the Act narrowly under the rule of lenity. The gap between the words used by Congress and the regulation also raises concerns about improper delegation of legislative authority.

Third, the "harm" regulation represents a federal agency's unilateral attempt to alter the balance of power between the states and the federal government. Congress deferred authority over nonfederal land management to the states by structuring the Act to provide for the conservation of habitats primarily through its directions to *federal* agencies, and by choosing to protect habitats on nonfederal lands through a land acquisition program and financial incentives to states. The Secretary should be no less respectful of state interests. When a particular interpretation of an Act of Congress may "upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this

balance." *New York v. United States*, 112 S. Ct. 2408, at 2425 (1992) (*quoting Gregory v. Ashcroft*, 111 S. Ct. 2401 (1991)).

All of these concerns raise issues of constitutional significance that could be avoided by affirming the decision of the lower court. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. De-Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

ARGUMENT

The Lower Court Correctly Concluded That The "Harm" Regulation Is Invalid On Its Face As An Appropriation Of Authority By FWS That Was Neither Expressly Conferred, Nor Intended, By Congress.

A. Congress Intended to Impose the Burdens of the Act's Mandated Conservation Measures Upon the Federal Government.

The lower court explained how the structure of the Act operates to "assign the primary task of habitat preservation to the [federal] government," with private persons acting only if they were "willing landowners" assisted by the federal government. Petitioners' Brief at App. 7a-9a, *Sweet Home* (No. 94-859). The agency's "harm" regulation is an unreasonable interpretation of Section 9 of the Act because it attempts to shift substantial costs and burdens of habitat conservation from the federal government to nonfederal entities without any congressional direction.

Petitioners attempt to minimize the importance of this shift by characterizing the regulation as limited in scope and innocuous in effect,[6] but it is obvious that the regulation would not have engendered the controversy presently before this Court if its effects were trivial. The federal mandate to manage literally millions of acres of land, significant water resources and associated aquatic and riparian habitats[7] primarily for the benefit of endangered species has generated tremendous political controversy and opposition to the Act. *See generally* James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 Harv. Envtl. L. Rev. 311, 318, 331-339 (1990).

Arizona's school trust lands provide ready examples of the ways in which the "harm" regulation shifts the economic burdens of habitat conservation to nonfederal property. Much of the school trust land in Arizona is

---

[6] Petitioners' Brief at 47-48, *Sweet Home* (No. 94-859); *see also* Amicus Curiae Brief for National Wildlife Federation, *et al.* at 13-16, *Sweet Home* (No. 94-859).

[7] For example, in addition to the millions of acres proposed as critical habitat for the Mexican spotted owl (Proposed Determination of Critical Habitat for the Mexican Spotted Owl, *supra*, note 2), approximately 6.9 million acres have been designated as critical habitat for the Northern spotted owl. *Determination of Critical Habitat for the Northern Spotted Owl*, 57 Fed. Reg. 1796, 1809 (Jan. 15, 1992). Approximately 3.8 million acres have been designated as critical habitat for the California gnatcatcher. *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. 65088, 65090 (Dec. 10, 1993). Approximately 6.5 million acres have been proposed as habitat for the desert tortoise. *Determination of Critical Habitat for the Mojave Population of the Desert Tortoise*, 59 Fed. Reg. 5820, 5827 (Feb. 8, 1994). These are but a few of many examples.

suitable only for grazing or agriculture; there is no other economic use to which they may be put. Yet on some of these lands, FWS has proposed to prohibit grazing, or restrict water use, or prohibit channelization that would prevent flood erosion.[8]

State Land's timber property, near Flagstaff, is home to Mexican spotted owls. According to FWS management guidelines, State Land must manage these lands to provide habitat for the owl, which makes timber harvest either prohibited or not economic, and prohibits removal of dead and down woody material that provides cover for prey species and fuel for forest fires. Not only do these management restrictions effectively eliminate

---

[8] *See, e.g., Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher*, 60 Fed. Reg. 10694, 10714 (restrictions on grazing and water use and diversion); *Proposed Rule to List the Cactus Ferruginous Pygmy-Owl As Endangered With Critical Habitat in Arizona and Threatened in Texas*, 59 Fed. Reg. 63975, (Dec. 12, 1994) (restrictions on grazing, water uses, flood control and channelization); *Proposed Determination of Critical Habitat for the Mexican Spotted Owl*, 59 Fed. Reg. 63162, 63163 and 63169, (Dec. 7, 1994) (restrictions on removal of timber and other vegetation); *Determination of Threatened Status for the Northern Spotted Owl*, 55 Fed. Reg. 26114 (June 26, 1990) (restrictions on timber harvest and other vegetation removal). The Tenth Circuit has interpreted *Palila v. Hawaii Dep't of Land and Natural Resources*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd* 852 F.2d 1106 (9th Cir. 1988) to mean that "one who maintains on his own land grazing animals that so modify the natural habitat as to cause indirect injury to endangered species can be required to remove those grazing animals from his land." *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1427-28 (10th Cir. 1986).

economic return from those lands,[9] they set the stage for disastrous forest fires.[10] The regulation thus transfers to the property owner, (in this case, State Land), the substantial costs that the federal government would be required to incur if it acquired these lands, or purchased a conservation easement.[11]

To diminish the force of this argument, Petitioners claim that the "harm" regulation is innocuous because it

---

[9] In northern spotted owl habitat, FWS interpreted "harm" to require that timber harvesting be avoided within a circle centered on a nest or activity center within a radius of 1.2-2.2 miles, or up to 3,960 acres surrounding each spotted owl nest site, without any evidence or allegation of injury to, or intention to injure, a single spotted owl. U.S. Fish and Wildlife Service, Region 1, *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* (July 4, 1990). According to one timber industry source, the economic impact of each "owl circle" could be as much as $160,000,000.00. A. Gidari, *The Endangered Species Act: Impact of Section 9 On Private Landowners*, 24 Envtl. L. 419, 421 (1994).

[10] *See* W.W. Covington and M.M. Moore, *Postsettlement Changes in Natural Fire Regimes and Forest Structure: Ecological Restoration of Old-Growth Ponderosa Pine Forests, in Assessing Forest Ecosystem Health in the Inland West*, 153-181 (R. Neil Sampson and David L. Adams eds., 1994); United States Forest Service, *Fire and Forest Health Southwestern Region* (1992).

[11] A conservation easement is a recognized interest in land which restricts the use of the land for conservation purposes. *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433, 435 (1984); Uniform Conservation Easement Act, 12 U.L.A. 66 (Supp. 1992). Most states have enacted legislation to recognize and enforce conservation easements in some form. *See* Kimberly K. Winter, *The Endangered Species Act Under Attack: Could Conservation Easements Help Save the ESA?* 13 N. Ill. U. L. Rev. 371, 385 n. 114 (1993).

is enforced infrequently. While it may be true that to date there have been relatively few reported cases in which FWS has sought criminal penalties in connection with activities that modify habitats on nonfederal lands, the number of such prosecutions is likely to increase if the regulation is reinstated by this Court, because the pressure on FWS to prosecute, through civil enforcement actions and otherwise, undoubtedly will escalate. Furthermore, the mere threat of criminal prosecution or civil suit under Section 9 may be sufficient to accomplish FWS objectives, particularly when the threat is made to state and local officials or owners of extensive lands that may be affected by a particular management restriction.[12]

Petitioners and their amici also argue that the "harm" regulation should be reinstated because to do so would foster the broad congressional purposes of the Act, citing an often-quoted passage from this Court's opinion in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978),

---

[12] Threats of prosecution may be expressed or implied by the text of FWS regulations. *Supra* note 10. FWS reportedly has threatened state and local officials in California, Washington and Texas with criminal investigation and prosecution for approving or permitting activities on private land. See Robert D. Thornton, *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 Envtl. L. 605, 613-614 (1991) (quoting a FWS letter to a Planning Director of a California city with respect to a zoning action); Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419, 430-435 (1994) (describing FWS letters to the Washington Forest Practice Board); *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993). Landowners with extensive holdings, such as State Land, are targets of FWS attention, and are therefore particularly vulnerable to threats of "take" prosecutions.

which declared that "[t]he plain intent of Congress in enacting this statute [the Endangered Species Act] was to halt and reverse the trend toward species extinction, *whatever the cost*." (Emphasis added.) Petitioners' reliance upon this passage is misplaced.[13] The costs to which this Court referred in *Tennessee Valley Authority v. Hill* were costs that would result from the enforcement of the Act's constraints upon *federal* activities, and that would be borne by the *federal* government, not costs that would be imposed upon nonfederal landowners.

In contrast, the "harm" regulation provides a means by which FWS may control wildlife habitats on nonfederal lands without the cost of acquiring a conservation easement or other federal property right.[14] The congressional findings and declaration of the purposes and policy of the Act (16 U.S.C. § 1531, Petitioners' Brief at App.

---

[13] In direct response to this Court's decision halting construction of the Tellico Dam, Congress encacted the 1978 amendments to the Act. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3752. Among other things these amendments established a procedure whereby federal agencies may obtain exemptions from the requirements of the Act. 92 Stat. at 3753-3760 (16 U.S.C. § 1536). They also provided that economic and other impacts may be considered in connection with the designation of critical habitat. 92 Stat. at 3766 (16 U.S.C. § 1533(b)(2)). The Act thus no longer requires conservation of endangered species "whatever the cost."

[14] Petitioners and their amici tacitly acknowledge this fact. Petitioners' Brief at 49, Brief of Amici Curiae Scientists at 17-19, Brief of Amicus Curiae Friends of Animals, Inc., at 8-9, *Sweet Home* (No. 94-859).

at 1a-3a, *Sweet Home* (No. 94-859), and the Act's legislative design, which includes specific mechanisms to preserve wildlife habitats at *federal* expense, contradict the necessary assumption that underlies the "harm" regulation, that Congress somehow intended to shift the *economic* burdens of species conservation from the federal government to nonfederal governmental entities and private persons through Section 9 of the Act. This Court should not allow a lone agency to ignore Congress' intent and shift costs elsewhere.

B. Affirming Invalidation of the "Harm" Regulation Would Avoid Substantial Constitutional Questions.

This "Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions." *Cheek v. United States*, 498 U.S. 192, 203 (1991). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. De-Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Secretary's construction of Section 9 of the Act as authorizing FWS to regulate and constrain the use of nonfederal land and to criminalize ordinary land use activities implicates serious constitutional issues that could be avoided by affirming the lower court's opinion invalidating the regulation.

1. Section 9, As Construed By The "Harm" Regulation, Will Result In Claims For Compensation For The Taking of Nonfederal Property.

The cost-shifting effects of the "harm" regulation are particularly troublesome to State Land because its extensive holdings of land are subject to legal restrictions that flow from the federal government's compact with the State of Arizona, made when the lands were granted to the State. These compacts, and their legal significance, were summarized by the dissent in *Andrus v. Utah*, 446 U.S. 500, 522-524 (1980) (Powell, J., dissenting):

> When the first 13 States formed the Union, each State had sovereign authority over the lands within its borders. These lands provided a tax base for the support of education and other governmental functions. When settlers sought to carve the State of Ohio from the Northwest Territory in 1802, they encountered a different situation. Vast tracts within the boundaries of the proposed State belonged to the Federal Government. Thus, the new State's potential revenue base would be restricted severely unless the Federal Government waived its immunity from taxation. In order to place Ohio on an equal footing with the original States, Congress enacted a compromise drawn from the Land Ordinance of 1785 and the Northwest Ordinance of 1787. The compromise set a pattern followed in the admission of virtually every other State. Specific details varied from State to State, but the basic plan persisted. As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of

> the lands within its borders for the support of public education.
>
> These agreements were solemn bilateral compacts between each State and the Federal Government. For its part, the Government granted the State specific sections of land within each township laid out by federal survey . . . In return, Congress required the State to memorialize its pledge not to tax federal lands "by ordinance irrevocable without the consent of the United States." *E.g.*, Act of July 16, 1894, § 3, 28 Stat. 108 (Utah). Congress also imposed upon the State a binding and perpetual obligation to use the granted lands for the support of public education. All revenue from the sale or lease of the school grants was impressed with a trust in favor of the public schools. No State could divert school lands to other public uses without compensating the trust for the full market value of the interest taken. *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 87 S. Ct. 584, 17 L.Ed. 2d 515 (1967); *see Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 96 S. Ct. 910, 47 L.Ed. 2d 1 (1976).

[Some citations omitted.]

It is well established that the federal government may condemn state lands, *see Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), and school trust lands are no exception to that principle. *United States v. State of Montana*, 134 F.2d 194, 196 (9th Cir. 1943). However, this Court has stated that "Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law . . . would constitute a taking of

the State's property without just compensation, in violation of the Fifth Amendment." *Block v. North Dakota*, 461 U.S. 273, 291 (1983). Absent some reserved right created by the instrument of conveyance or statute pursuant to which the lands were granted, this rule appears equally applicable to lands vested in a state by Congress.[15]

The requirement that nonfederal land be maintained in a particular condition (usually undeveloped), for *use and occupancy by* wildlife is tantamount to an appropriation of an easement or similar estate in land. When such a servitude is imposed, a taking may be found. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (permit conditioned upon public access easement found to be a taking); *Lucas v. So. Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992) (ban on construction on beach lots found to be a taking). In *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), this Court struck down a municipal ordinance that conditioned approval of a building permit upon the landowner's dedication of portions of the property to the city for greenway and a pedestrian bicycle pathway, both laudable public purposes. In so holding, the Court observed that "[o]ne of the principal purposes

---

[15] Since this Court's decision in *Lassen v. Arizona*, 385 U.S. 458 (1967), it generally has been accepted that states may not grant to the United States a right-of-way or other interest in school trust lands without compensation. *See, e.g., United States v. 78.61 Acres of Land in Dawes and Sioux Counties*, 265 F. Supp. 564 (Neb. 1967); *United States v. 111.2 Acres of Land in Ferry County*, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (1970); *State of Utah v. Andrus*, 486 F. Supp. 995 (Utah 1979); *Sierra Club v. Hodel*, 675 F. Supp. 594 (Utah 1987), *aff'd in part and rev'd in part*, 848 F.2d 1068 (1988).

of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the whole.' *Armstrong v. United States*, 364 U.S. 40 (1960)". *Dolan*, 114 S. Ct. 2309. That is precisely the effect of the "harm" regulation, and an important reason why it properly was held invalid.

Because Fifth Amendment takings are compensable, a statute which results in such takings is not thereby rendered unconstitutional. *See United States v. Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36 (1974). Nevertheless, the potential for the "harm" regulation to result in Fifth Amendment takings weighs against its validity, because of the concomitant impact upon budgetary priorities established by Congress. Considering the entrenched deficit with which Congress continually struggles, this Court should avoid interpreting the Act in a manner that creates unfunded monetary liability for the federal government, as such liabilities would circumvent congressional prerogatives to raise revenue and appropriate funds. *See* U.S. CONST., art. I, §§ 8 and 9; *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *NBH Land Co. v. United States*, 576 F.2d 317 (Ct. Cl. 1978).

2. Section 9, As Construed By the "Harm" Regulation, May Be Unconstitutionally Vague.

The "harm" regulation also presents Fifth Amendment void-for-vagueness problems because the "take" prohibition is a strict liability statute without a scienter requirement, *see United States v. Nguyen*, 916 F.2d 1016

(5th Cir. 1990), and the statute does not give fair notice as to what constitutes illegal conduct. This problem was described in *United States v. Rollins*, 706 F. Supp. 742 (D. Idaho 1989), in which the court found the "take" provisions of the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703 and 707, void for vagueness as applied to ordinary farming practice that actually killed migratory birds. Rollins, an Idaho farmer, was prosecuted when a flock of geese died after consuming alfalfa that had been sprayed with pesticides. Based upon his prior experience, Rollins believed the spraying of pesticides posed no danger to the geese. The court concluded that the MBTA did not give fair notice that such conduct was illegal:

> A farmer like Rollins is exposed to sanctions because he tended his crops in the same manner as other area farmers. These examples make one queasy about the reach of strict liability criminal statutes. . . . Under our system of government, "which is designed to foster individual liberty and restrict the arbitrary exertion of governmental authority," *United States v. Stenberg*, 803 F.2d 422, 435 (9th Cir. 1986), a criminal statute must define the offense "with sufficient definiteness that *ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.*" *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

706 F. Supp. at 744 (emphasis supplied). The court emphasized that FWS's interpretation of the statute criminalized ordinary activities:

> An ordinary person would not expect Rollins' conduct to be criminal. The statute itself does not state that poisoning of migratory birds by

> pesticide constitutes a criminal violation. Such specificity would not have been difficult to draft into the statute. Farmers have a right to know what conduct of theirs is criminal, especially where that conduct consists of common farming practices carried on for many years in the community.

706 F. Supp. at 744.

The "harm" regulation suffers from similar infirmities. Due to its indirect approach to the issue of "take," the regulation may criminalize ordinary activities, such as harvesting timber, clearing weeds, irrigating crops, and channelizing streams to protect arable fields.[16] These activities may be criminal only at certain times of the year, or in certain locations, so the regulation easily could become "little more than a trap for those who act in good faith." *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Because the standard by which "harm" may be determined is itself vague, there is potential for selective and discriminatory enforcement.[17]

---

[16] *See* note 8, *supra*.

[17] For example, it is left to FWS to determine what behavioral patterns are "essential," whether those patterns have been "significantly impaired," and whether, as a consequence, wildlife (individuals or species as a whole) has been "injured". FWS has taken the position that reduced breeding success can be an actual injury even without physical injury or death of a known individual. *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1271-72 (E.D. Tex. 1988), *aff'd in pertinent part sub nom, Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991); *Palila, supra*. These are issues as to which scientists may disagree, and which are not at all obvious to ordinary persons whose activities are not directed at wildlife.

A vagueness challenge that does not involve First Amendment freedoms must be examined in light of the facts of the case at hand. *See United States v. Mazurie*, 419 U.S. 544 (1975). Even if this Court finds that Respondents' challenge to the "harm" regulation does not squarely present the vagueness issue, the Court should consider the likelihood that the issue will be presented in a proper case, because invalidation of the regulation would avoid the issue entirely.

3. The Harm Regulation Is Constitutionally Suspect As An Overbroad Construction Of A Criminal Statute.

This Court should not conclude lightly that by the use of the word "harm," in the context of a statutory provision heretofore applied to the intentional capture or killing of specific animals, Congress intended to criminalize otherwise lawful land uses on nonfederal lands. Had Congress so intended, it would have said so explicitly. This Court wisely insists on clear statutory statement before it will transform ordinary activities into crimes. *See, e.g., United States v. X-Citement Video*, 115 S. Ct. 464, 467-68 (1994).

Where, as here, a statutory term has civil and criminal consequences, the rule of lenity requires courts to "resolve . . . ambiguity in [the defendant's] favor." *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109-10 (1992) (plurality opinion); *Crandon v. United States*, 494 U.S. 152 (1990). The rule of lenity should prevail over any form of deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), because it reflects concern about constitutional principles, such as the improper delegation of legislative authority and due process. *See Note, Increased Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 642-46 (1992). If Congress did intend the word "harm" to encompass habitat modification, then it failed to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," and the regulation is invalid as the product of a forbidden delegation of legislative power. *Touby v. United States*, 500 U.S. 160 (1991).

In fact, FWS has adopted a schizophrenic approach to the issue of habitat modification on nonfederal lands that reflects the absence of an intelligible, conforming principle. On the one hand, in the 1978 House hearings, FWS claimed that the designation of critical habitat would have no direct impact on the environment.[18] On the other hand, habitat is only critical if it is essential to species survival, and therefore it logically follows that using the FWS definition of "harm," conduct that renders critical

---

[18] FWS claimed that:

> "[T]he designation of Critical Habitat does not have any direct impact upon the environment. The designation of Critical Habitat, in and of itself, prevents nothing, stops nothing, discourages nothing, and controls nothing. It simply designates an area that is necessary to the continued existence and possibly to the recovery of an Endangered or Threatened species. It is a biological designation."

Endangered Species Authorization: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries, 95th Cong., 2d Sess. 1155 (1978).

habitat unsuitable for a listed species is a "take." In fact, the "harm" regulation may have a more extensive effect upon nonfederal landowners than it does on federal agencies because FWS considers that management limitations may be applicable to lands that have not been designated as critical habitat if "harm" would otherwise result.[19] Such contradictory positions emphasize the infirmity of the "harm" regulation.

4. Constitutional Authority for the Harm Regulation Is In Doubt.

Another series of constitutional questions arises because the "harm" regulation operates as a federal constraint against modifying flora on nonfederal lands. Significant questions exist as to whether the federal government has authority under the United States Constitution to enact such legislation. See *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (leaving open the question of the extent, if any, to which the Property Clause empowers Congress to protect animals on nonfederal lands); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 309-310 (1981) (Rehnquist, J., concurring); *Comment, Endangered Species Act: Constitutional Tensions and Regulatory Discord*, 4 Colum. J. Envtl. L. 97 (1977); G. Coggins,

---

[19] *See, e.g., Determination of Critical Habitat for the Northern Spotted Owl; Final Rule*, 57 Fed. Reg. 1796, 1825 (Jan. 15, 1992), ("If an action that is committed by a non-Federal entity affects spotted owls, that action would be subject to review under Section 9 of the Act. Section 9 prohibits intentional and non-intentional "take" of listed species and applies regardless of whether or not the lands are within critical habitat.")

and W. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?* 61 Iowa L.J. 1099 (1976).

Congress was sensitive to these issues when it enacted the Endangered Species Act in 1973. Senator Williams' bill, as introduced, defined "take" to include "the destruction, modification, or curtailment of [a listed species'] habitat or range." *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 27 (1973) (hereinafter *1973 Senate Hearings*). Some testimony given then in support of that language was quite similar to the arguments Petitioners and their amici now make in support of the "harm" regulation.[20] Senator Stevens, a former Solicitor of the Department of Interior, expressed concern about the scope of congressional authority to exercise jurisdiction over flora on non-federal lands:

> Senator STEVENS: I understand that, but my problem is I just wonder if we are again getting ourselves into some situation with regard to

---

[20] Witnesses representing environmental groups stressed that this expanded definition of "take" was needed because "an animal or plant which is killed as a result of habitat destruction, in fact, in some respects is deader than if it is shot or chopped down, because there may be no further chance for its kind to ever return to that area." *1973 Senate Hearings* at 80 and 86 (testimony of John Grandy of the National Parks and Conservation Association); *see also id.* at 104 (similar statement by Tom Garrett of Friends of the Earth), 81 and 108 (additional statements by Mr. Grandy), 123-125 (statement of Stephen R. Seater of Defenders of Wildlife), and 129 (statement of Robert Hughes of the Sierra Club).

> extension of Federal jurisdiction to flora in private hands.

1973 Senate Hearings at 90. The Senate Committee later deleted the "habitat modification" language, and its report stressed that the States should have the lead "in protecting domestically endangered species," with the federal role primarily being to appropriate funds "to acquire lands" and to support the efforts of States. S. Rep. No. 93-307, 93d Cong., 1st Sess. at 2-5, *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991-93.

Similar comments and concerns were expressed in the House. At the 1973 House hearings, environmental groups urged that the House bill's definition of "take" be expanded to include "habitat modification." *See Endangered Species: Hearings on H.R. 376 and Other Bills Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 1st Sess. 251, 287, 299, 301, 307 (1973) (hereinafter *1973 House Hearings*). Representative Dingell objected, stating:

> I am sympathetic with your goal of preserving the species from not only the actual, direct taking, but also from habitat change. I wonder if it would not better serve to protect habitats . . . to leave the term "taking" as it is with perhaps some additional language relating to other matters.

1973 House Hearings at 305. The House Committee did not expand the term "take" to include "habitat modification." Representative Sullivan explained:

> [The ESA] will meet this [destruction of a habitat] problem by providing funds for acquisition

> of critical habitat [because private landowners] are understandably unwilling to do so at excessive cost to themselves.

119 Cong. Rec. 30,162 (daily ed. Sept. 18, 1973).

The 1982 Senate hearings reveal that the U.S. Department of the Interior had continuing questions over its constitutional authority to regulate removal of plants (modification of habitat) on private lands. G. Ray Arnett, the Assistant Secretary of the Interior for Fish, Wildlife and Parks, testified as follows:

> Senator CHAFEE: Mr. Arnett, under section 9, dealing with taking, there is nothing involved in the taking of individual species of endangered plants. We are going to have testimony, I am sure, asking for the expansion of the act's prohibitions to include the takings under section 9 for plants. What do you think of that?
>
> Mr. ARNETT: We have given this much thought, Senator, and are studying the question and would like to get back to you on this because there seems to be a constitutional question raised about the applicability of this particularly on private lands. . . . [W]e are looking at the constitutionality of it as prohibiting [the] taking on private lands, a guy's backyard, or ranch, or farm. I don't know where we are going to come back on that as yet. I would be happy to get back to you on that.
>
> Senator CHAFEE: Whatever the constitutional problems, it would seem to me that they would apply to fish and wildlife as much as plants if the problem is private lands, wouldn't it?
>
> Mr. ARNETT: Not to my knowledge sir. I am not an attorney. I am just listening to the problems

> that our Solicitor raises along these lines. As I say, it is being studied right now. On Federal lands we currently have the authority that makes this possible. We may not have the additional authority on other lands. It may be detrimental. It may not. It may be unconstitutional.

Endangered Species Act Amendments of 1982: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. On Environment and Public Works, 97th Cong., 2d Sess. 10 (1982).

Congress was aware of concerns about the extent of its constitutional authority to regulate habitats on nonfederal lands. Both houses deleted language that would have explicitly granted such authority to FWS. Accordingly, neither the inclusion of the word "harm" nor the ambiguous incidental "take" provisions added by Congress in 1982 should be construed as granting or confirming FWS's authority to regulate the modification of a habitat on nonfederal lands. "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993).

C. The Act Should Not Be Construed in a Way That Intrudes Upon Traditional State Authority Over Nonfederal Lands and Upsets the Balance of Federal and State Powers.

Even if this Court somehow finds that the intent of Congress was ambiguous, the lower court's decision should be affirmed because the regulation intrudes upon

the States' traditional police power to regulate land use, and thereby alters the balance of power between the states and the federal government. This is particularly important because "the political debate at the hearings had focused on federal-state sovereignty. . . . " Salzman, *supra*, 14 Harvard Envt'l L. Rev. 311, 316. When this Court is urged to interpret an Act of Congress in a way that may "upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides this balance." *New York v. United States*, 112 S. Ct. 2408 at 2425 (1992) (emphasis supplied), (*quoting Gregory v. Ashcroft*, 111 S. Ct. at 2401 (1991)).

Congressional intent has become of paramount importance to the determination of when an Act of Congress has transgressed the limitations of the Tenth Amendment. Over time the line of demarcation between state and federal authority has become increasingly difficult to discern. Whereas formerly the Court determined transgressions by reference to "integral" or "traditional" powers, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 566 (1985), the Court reasoned that because the residuary sovereignty of the states is secured by the procedural safeguards inherent in the structure of the federal system, the limits of federal authority should not necessarily be defined with reference to "integral" or "traditional" powers. 469 U.S. at 552-555. Under this analysis, the "harm" regulation is invalid because it skews the effects of the political process upon the Act.

The Act resulted from a political process in which deference to states featured prominently. Congress chose

to direct state activity regarding endangered species through incentives and cooperation, rather than direct regulation of nonfederal lands. By refraining from regulation of nonfederal lands, Congress continued its traditional deference to state law in matters of land use, a deference which is apparent in other sections of the ESA. *See, e.g.*, 16 U.S.C. §§ 1533(d), 1535(c)(1)(E)(ii), and 1535(g)(2)(B).

Congress has regularly demonstrated a large degree of deference to states in regard to real and personal property rights and land use planning matters, which traditionally have been considered within the exclusive authority of states. As this Court stated in *United States v. Fox*, 94 U.S. 315 (1876):

> [T]he title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State.

94 U.S. at 320-321. *See also United States v. State of California*, 281 F.2d 726 (9th Cir. 1960); *see generally Katzenbach v. McClung*, 379 U.S. 294 (1964). This deference includes direction to federal agencies to cooperate with local land use planning and zoning measures that would otherwise not apply to federal property. *See, e.g., Federal Urban Land Utilization Act*, 40 U.S.C. § 533; *Federal Land Policy and Management Act of 1976*, 43 U.S.C. § 1701, particularly § 1712(c)(9). State regulation of wildlife habitat is also an area of historic state dominance and congressional deference. *See Geer v. Connecticut*, 161 U.S. 519 (1896), *overruled*

on other grounds, Hughes v. Oklahoma, 441 U.S. 332 (1979). In areas where states historically have played a major role, this Court wisely does not interpret ambiguous federal legislation as displacing that role. *See United States v. New Mexico*, 438 U.S. 696, 715 (1978).

Considering the long history of congressional deference to states in the management of nonfederal lands and natural resources, which is reiterated in the Act, it is inconceivable that Congress would so radically alter that policy by the use of a single word in a section of the Act that does not even mention habitat modification. This Court should not permit a single-purpose federal agency to override the political process and usurp state authority over land uses, which are fundamental to the health and welfare of citizens.

The suggestion by amici scientists (Brief of Amicus Curiae Scientists, *Sweet Home* (No. 94-859) at 24-26) that this Court should expand federal authority to protect species through the "public trust" doctrine in order to validate the assumption of power by FWS is both legally unsound and bad public policy. *See generally*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631 (1986). This Court need not and should not become a party to the agency's intrusion upon legislative prerogatives and state interests by extending a doctrine that historically has been limited to public rights in navigable waters and their submerged streambeds to encompass the much broader issue of wildlife habitat conservation.

Finally, FWS threats to prosecute state officials for "take" violations if they issue permits or otherwise authorize uses of nonfederal lands that FWS considers harmful to endangered species implicates the concerns about political accountability that have troubled this Court in the past:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [Whereas if the Federal Government legislates directly, thereby making the decision] in full view of the public . . . it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who bear the brunt of public disapproval, while the federal officials who devised the regulatory program remain insulated from the electoral ramifications of their decisions. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

New York v. United States, 112 S. Ct. at 2424 (citations omitted). By authorizing wildlife biologists to coerce nonfederal governments to regulate nonfederal lands in accordance with the needs of endangered species, the "harm" regulation acquires the potential to become the greatest of all unfunded federal mandates,[21] as well as

---

[21] In fact, the enormous cost of preserving habitats on nonfederal lands, and (by inference) the unavailability of federal funds to acquire such habitats, is offered by amici scientists as a

shifting liability from the federal government to the states.[22]

These troubling issues may and should be avoided completely by this Court affirming the lower court's conclusion that the "harm" regulation is invalid because it exceeded the authority granted by Congress.

CONCLUSION

For the reasons stated, the decision of the court of appeals should be affirmed.

Respectfully submitted,

GRANT WOODS
Attorney General
State of Arizona

MARY MANGOTICH GRIER*
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007
(602) 542-7783

Counsel for State Land

*Counsel of Record

March 22, 1995

---

justification for the regulation. Brief of Amici Curiae Scientists, *Sweet Home* (No. 94-859) at 17-19.

[22] For example, land use restrictions imposed under the threat of a "take" prosecution may result in the assertion of inverse condemnation claims against a state for refusing to issue a permit otherwise authorized by applicable state law, whereas the liability should be that of the federal government.